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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IIMMIGRATION JUSTICE CLINIC

4 Plaintiff

5 v.

12 CV 1874 (GBD)

6 UNITED STATES DEPARTMENT OF
7 STATE

8 Defendant

9 New York, N.Y.

10 August 7 2012

11:00 a.m.

11 Before:

12 HON. GEORGE B. DANIELS

13 District Judge

14 APPEARANCES

15 CARDOZO SCHOOL OF LAW
16 Attorney for Plaintiff
17 BETSY GINSBERG

18 UNITED STATES DEPARTMENT OF JUSTICE
19 UNITED STATES ATTORNEY'S OFFICE
20 SOUTHERN DISTRICT OF NEW YORK
21 Attorney for Defendant U.S. Dept. of State
22 PATRICIA L. BUCHANAN
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1 (In open court)

2 THE DEPUTY CLERK: Immigration Justice Clinic of the
3 Benjamin Cardozo School of Law v. U.S. Department of State.
4 Docket No. 12CV1874.

5 Please stand and state your name for the record
6 beginning with the plaintiff.

7 MS. GINSBERG: Betsy Ginsberg for Cardozo Law School.

8 THE COURT: Good morning, Ms. Ginsberg.

9 MS. GINSBERG: Good morning, your Honor.

10 MS. BUCHANAN: Good morning, your Honor. Patricia
11 Buchanan for the Department of Justice.

12 THE COURT: Good morning, Ms. Buchanan.

13 Ms. Ginsberg, where are you students?

14 MS. GINSBERG: It's the summertime, Judge.

15 THE COURT: That's the first thing you teach them, you
16 still work in the summer.

17 MS. GINSBERG: Well, we've got one here in the back.

18 THE COURT: Let her come up and sit at the table.

19 MS. GINSBERG: Thank you, your Honor.

20 She is not practicing under a practice order, but...

21 THE COURT: Sure.

22 Ms. Ginsberg, I need to see the document. It's hard
23 for me to figure out -- in camera I'll review it and figure
24 out -- I understand your argument. I'm not sure I can accept
25 the argument that simply because it's in a certain file that

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1 that means it's exempt. I think the statute really does say
2 the documents are exempt, not that you get protection because
3 you've shove everything that's not exempt into a certain file.

4 You say it's not segregatable, but I just don't have a
5 concept of what you're talking about. Quite frankly, it all
6 seems to me much ado about nothing because it seems to me your
7 first response is that doesn't have any information that
8 they're looking for.

9 If they are looking for something that is relevant to
10 a conclusion that the plaintiff -- I mean, the individual is
11 lawfully in the United States. So I'm not quite sure -- I
12 guess -- I'm sorry, I said Ms. Ginsberg; I meant Ms. Buchanan.

13 Ms. Ginsberg, let me start with you. What is it
14 you're looking for? What document? What is it in there that
15 you think is responsive to your request?

16 MS. GINSBERG: Well, your Honor, our client is
17 severely mentally ill and has a severe cognitive impairment.
18 So the psychologist and the several psychiatrists who've
19 examined her have said she can't give her biographical history.
20 She can't tell us any reliable information. So, we are looking
21 for information about her and her immigration that will support
22 her claim that she is here lawfully.

23 THE COURT: So it doesn't sound to me that any way
24 they describe this document that that's what this document is.

25 MS. GINSBERG: Excuse me, your Honor. They say that

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1 it contains biographical data. So to the extent that it
2 contains biographical data that we don't already have or know
3 about her or that it conflicts with other biographical data
4 that we do have, it may be useful to us. It may not be, but we
5 can't know that without seeing the document.

6 THE COURT: When you say biographical data, what is it
7 that you don't know that you're looking for? I'm not sure.

8 MS. GINSBERG: Where she was born.

9 THE COURT: OK.

10 MS. GINSBERG: When she came into this country; other
11 information about her history that may or may not be included
12 in that document; statements that she may have made while she's
13 here.

14 THE COURT: Statements about?

15 MS. GINSBERG: Her immigration.

16 THE COURT: At issue I assume is the sole issue of
17 whether or not she was legally admitted into the United States.

18 MS. GINSBERG: That is primarily the issue, although
19 there are other factors that go into determining whether
20 someone can stay here in this country whether or not they were
21 admitted lawfully. So we would like to know as much as we can
22 to assist her in determining whether there's a way for her to
23 lawfully stay in the country if in fact she isn't already
24 lawfully in this country which we don't know.

25 THE COURT: All right.

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1 MS. GINSBERG: Your Honor, under FOIA, none of -- the
2 relevance of the document to our immigration court case doesn't
3 matter. In fact, the immigration court case is no longer
4 ongoing. However, her status is still up in the air. What
5 matters is the FOIA statute that requires the government to
6 turn over documents and --

7 THE COURT: What matters is what the nature of your
8 requests were. That's what I'm trying to get at. The nature
9 of your request, I thought, was very specific about the type of
10 document that you were looking for.

11 MS. GINSBERG: Our request was quite broad in that it
12 relates to anything concerning her immigration, and her history
13 coming into this country. So it is not simply about visa
14 information in particular. It's about any information that
15 they have about her.

16 THE COURT: What information would they have about her
17 with regard to her admission into the United States other than
18 her visa information?

19 MS. GINSBERG: If she didn't apply for a visa, which
20 the state department says that she did not, she came into this
21 country -- either she was naturally born here or she came into
22 this country from another country in some way, and they may
23 have information about that. They may have information about
24 what she said about how she arrived in this country.

25 THE COURT: But the nature of the representations I

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1 thought were that none of that information is on this document.

2 MS. GINSBERG: The representations made by the state
3 department is that none of the information in this document
4 pertains to an application for a visa by this particular
5 person. It doesn't say anything about anything else other than
6 how it relates to an application for a visa.

7 THE COURT: Well, I thought it was a little broader
8 than that. I thought she -- I guess it was Ms. Walters?

9 MS. GINSBERG: Yes.

10 THE COURT: I thought she had an affidavit basically
11 saying that there wasn't any information with regard to her
12 entrance into the United States, but maybe I'm incorrect.

13 MS. GINSBERG: I would have to look at that document
14 again. The state department does not contest that this
15 document falls within our request. The only reason that
16 they've created this Vaughn index about this document is
17 because it's responsive to our request. They've already
18 admitted that it's responsive. The only question is whether
19 it's exempt, and our argument is that it cannot be exempt.

20 THE COURT: Let me ask Ms. Buchanan, I guess my first
21 question is, Ms. Buchanan, in what way is it responsive to the
22 request if it doesn't have the information she's asking for?

23 MS. BUCHANAN: That's a good question, your Honor. We
24 might refine it a bit and say it was responsive to the search,
25 but it is not truly responsive to the request. Because it

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1 turned up in the search, we've identified it. But plaintiff
2 has somewhat of an inconsistent position because she provided
3 the name and date of birth for which she wanted a search
4 conducted country of citizenship, so a search was conducted
5 using that biographical data, and a record was discovered, but
6 it's not responsive to the request pertaining to whether there
7 is a lawful entry and whether there was an alien number
8 assigned and so on. So, really it's more of a nuanced
9 response, but in the abundance of caution in disclosure we
10 identified it as responsive, but, again, it's not fully
11 responsive, and we tried to provide sufficient information in
12 the Vaughn to assist the plaintiff in determining that the
13 records of the department of state database were really not
14 responsive or helpful to the request.

15 May I take a few minutes to respond to a few other
16 points your Honor raised?

17 THE COURT: Sure.

18 MS. BUCHANAN: I think just very broadly, your Honor,
19 to the extent the Court requested the government provide the
20 documents for in camera review.

21 THE COURT: I thought you offered to provide the
22 documents.

23 MS. BUCHANAN: Well, we are prepared to do that. I
24 have them here today and I can certainly provide them up. But,
25 to be clear, our position is this is not a specific document

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1 assessment review. It is our position that these documents are
2 categorically covered by the confidentiality statute at issue
3 here, so it is not relevant what the content --

4 THE COURT: But none of the cases that you cite stand
5 for that broader proposition that simply because it's in a
6 particular designated file, that that's the only inquiry that's
7 supposed to be made. Isn't there supposed to be an individual
8 inquiry as to the document that you want to withhold?

9 I mean, simply because you put a driver's license in
10 the file, that doesn't necessarily make it the category of
11 document that is exempt, does it? You say that everything you
12 dump in this file, whether it should or shouldn't be in this
13 file, regardless of who made the determination and regardless
14 of the subject matter, that that makes it exempt because you
15 put it in the file?

16 MS. BUCHANAN: Respectfully, yes, because --

17 THE COURT: What case is that?

18 MS. BUCHANAN: Well, it's the declaration.

19 THE COURT: Well, the declaration doesn't say that.
20 As a matter of fact, the declaration says, and you've conceded,
21 that this is not the only purpose of this file; that visa
22 applications aren't the only purpose of this file. Now you've
23 divided it into, well, there's a visa application part of the
24 file and there's another aspect of the file; but simply being
25 in this file doesn't give it the protection that you're

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1 arguing. If that were the case, you wouldn't have done a
2 search for that file.

3 MS. BUCHANAN: No, but -- respectfully, no, your
4 Honor, we're required to do a search of the confidential
5 records, and the position is because the document is in a
6 database pertaining to visa issuance and refusals --

7 THE COURT: But I don't know of any case that says
8 that. Is there any case that says because the document itself
9 is in a file that's used, that makes the individual document
10 necessarily falling into a certain category? The category
11 talks about an assessment of the individual document, isn't
12 that what the exemption deals with?

13 MS. BUCHANAN: No --

14 THE COURT: Everybody who's discussed exemption says
15 you have to look at the document and see if the document is
16 exempt, right?

17 MS. BUCHANAN: With respect, no. Exemption three is a
18 different inquiry and analysis than you have with some of the
19 other exemptions.

20 THE COURT: OK.

21 MS. BUCHANAN: Exemption three directs the Court to
22 the specific statute.

23 THE COURT: Right.

24 MS. BUCHANAN: In this case, it's 1202 --

25 THE COURT: But that statute doesn't say anything

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1 about being in a file that gives it exempt status, does it?

2 MS. BUCHANAN: It says a record pertaining to the
3 issuance or refusals of visas.

4 THE COURT: Right.

5 MS. BUCHANAN: This record was obtained from a
6 database that is used for the issuance and refusal of visas.

7 THE COURT: But I didn't hear you articulate in what
8 way this record pertains to an assessment of a visa other than
9 it's in a file that they might look at if they were going to
10 check the visa. That doesn't necessarily mean --

11 MS. BUCHANAN: The fact that it's in the file or in
12 the database --

13 THE COURT: Suppose it's misfiled?

14 MS. BUCHANAN: Excuse me?

15 THE COURT: Suppose it's misfiled? Suppose your
16 review of this document was to say to me, Judge, this document
17 has absolutely nothing to do with visa application. Would you
18 say it's still exempt because it's in the file?

19 MS. BUCHANAN: Your Honor, yes, there's a presumption
20 that if it's in the database, it's --

21 THE COURT: Well, it's not an irrebuttable presumption
22 if the document --

23 MS. BUCHANAN: Well, the department of state maintains
24 a database, and they put information in that database that is
25 used for issuance and refusal of visas.

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1 THE COURT: Some information is used. Some
2 information is irrelevant. Right?

3 MS. BUCHANAN: Respectfully, no. If it's in there,
4 it's something that's considered. So, if a person is going to
5 apply for a visa, they're going to look in that database to
6 make a determination on that visa. So the database is used for
7 the determination.

8 THE COURT: And your argument is even a little further
9 than that. You're saying that none of this information --
10 well, I won't say none of it. The document that is in issue
11 was never used for visa evaluation. You're not arguing that it
12 did relate to some visa assessment. You're saying because it's
13 in the file, some day in the future it might be reviewed for a
14 visa application, so, therefore, that makes it exempt.

15 That's a little bit more of a step than what I think
16 Congress was concentrating on when they said if the document
17 pertains to the visa application, then you don't have to turn
18 over the document. What they intended primarily was that if
19 you're assessing someone's visa application and they accumulate
20 documents that are relevant to that, that pertain to that
21 application, that they don't have to disclose all the things
22 that they reviewed in making their assessment. That's what
23 primarily it deals with.

24 I've never seen a published case or knew of an
25 instance where the government has simply argued: It's in the

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1 database, it's never been used to review a visa application,
2 but because it's in the database, sometime in the future, which
3 we don't anticipate at this point, it might be used in a visa
4 application because it's in the file. So, therefore, even
5 though the document has absolutely nothing to do with an
6 assessment of someone's visa, specifically it's exempt.

7 Is there a case that says that?

8 MS. BUCHANAN: Respectfully, your Honor, I refocused
9 the analysis, if I may. You know, the focus is really on the
10 statute that the department of state administers and how they
11 create their records and what their understanding of the use is
12 and how they use it.

13 If I could direct the Court to a case -- and I really
14 raise this in response to plaintiff's reply brief regarding the
15 scope of the Court's review -- plaintiff argues that the FOIA
16 should be construed broadly in favor of release. I'm hearing a
17 little bit of that view from the Court --

18 THE COURT: That's not my view. I think it should be
19 interpreted consistent with the language of the statute and
20 Congress's intent.

21 MS. BUCHANAN: I think with respect to interpreting
22 the precise statute at issue here, it's a statute that the
23 department of state uses and implements. So, specifically, I
24 just want to direct the Court to a case of the *Church of*
25 *Scientology of California v. Internal Revenue Service*; it's at

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1 792 F.2d 153. That's from the D.C. Circuit 1986. The jump
2 cite is 167. It's an en banc decision from the circuit court,
3 and there's a concurring opinion that specifically addresses
4 exemption three, and that in the interpretation of how that
5 statute should be construed, the Court should defer to the
6 administrative agency under a general Chevron deference because
7 they're the agency that administers that statute.

8 THE COURT: Defer on what issue?

9 MS. BUCHANAN: On interpreting -- what standard of
10 review the Court uses to interpret the statute at issue.

11 THE COURT: I'm not sure I understand what is in
12 dispute about the standard of review. What do you claim the
13 standard of review is?

14 MS. BUCHANAN: That the department of state should be
15 given deference in how they interpret the 1202(f) and with
16 respect to visa information in that database.

17 THE COURT: So where is it that they've given some
18 different interpretation in the application --

19 MS. BUCHANAN: Well, the interpretation that is
20 described here; that is, if information is put in that database
21 for the purpose of using it for determining visa eligibility,
22 then it's covered by the statute and the confidentiality
23 provisions in that statute.

24 THE COURT: I don't have anything in this affidavit
25 that says it was put in that file for the purpose of assessing

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1 a visa application. There was no visa application.

2 MS. BUCHANAN: It says it's in there for the use of
3 visa determinations.

4 THE COURT: They didn't do a visa determination nor is
5 there any -- that's a factual question. Why do I assume that
6 that's why it was put in there?

7 MS. BUCHANAN: That's the purpose of that database.
8 That's what the declaration says.

9 THE COURT: I know, but that doesn't tell me why a
10 particular document went into that database.

11 MS. BUCHANAN: Yes, it went into the database because
12 the purpose of that database is to collect information --

13 THE COURT: How do we know?

14 MS. BUCHANAN: Because that's what the declaration
15 says.

16 THE COURT: Well, the declaration doesn't tell me
17 anything about the circumstances of putting this document into
18 the database.

19 MS. BUCHANAN: Well, the purpose of the database is to
20 use it to determine visa eligibility.

21 THE COURT: There are multiple purposes of a database.

22 MS. BUCHANAN: No, the visa component from which this
23 document was retrieved --

24 THE COURT: Right.

25 MS. BUCHANAN: -- is used for visa eligibility

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1 determinations.

2 THE COURT: All right.

3 MS. BUCHANAN: So they wouldn't put information in
4 there if it wasn't relevant to visa --

5 THE COURT: Well, they shouldn't put information in
6 there if it's not relevant. To say they wouldn't, neither one
7 of us can say that.

8 MS. BUCHANAN: That's where it goes back to deference
9 to the agency, if they're creating a database and they know
10 what their use is for it.

11 THE COURT: But that's not the deference to the agency
12 I'm supposed to give. That's not what the Second Circuit says.
13 The Second Circuit says I'm supposed to give them deference on
14 their interpretation of the statute. It doesn't say I'm
15 supposed to give them deference as to every individual document
16 they want to toss in the file. That's not what it says.

17 MS. BUCHANAN: The statute provides that the records
18 that are in there with respect to records that pertain to
19 visa --

20 THE COURT: No, it says that those are records that
21 are supposed to go in there. Right?

22 MS. BUCHANAN: Right. And you can assume that if it's
23 in there, it's put in there because it pertains to visa
24 adjudications. They're administering the statute. There's
25 certainly a presumption --

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1 THE COURT: Well, I think the first thing is that --
2 and then I have an indication that the information isn't
3 segregatable, which is also part of the analysis you asked me
4 to rely upon, that nothing in this document is responsive and
5 can be produced in that manner. But I don't have any concept
6 of what you mean by why it's not segregatable. One section has
7 a date of birth, and another section has information about why
8 if she applies for a visa, it should be denied. I'm not sure
9 why you argued that that's not segregatable in the abstract as
10 to everything on the document. I find it hard to accept that
11 nothing is segregatable on the document simply by a blanket
12 statement to that effect without seeing the document. Is your
13 position that absolutely nothing on this document can be
14 segregatable because of what? Simply because you want the
15 blanket protection or because you really say it's not
16 segregatable.

17 MS. BUCHANAN: It's primarily because there is a
18 blanket confidentiality --

19 THE COURT: That doesn't tell me it's not
20 segregatable.

21 MS. BUCHANAN: In any event, your Honor, the
22 information is collected -- it has to do with the way the
23 information is collected and assembled that makes it
24 non-segregatable.

25 THE COURT: I accept that, but I have no idea what

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1 you're talking about. I cannot even -- I don't have an image
2 of what you mean by that. You tell me it's a three-page
3 document, and I've redacted plenty of documents in my time, and
4 I've never heard anyone just giving a blanket "nothing is
5 segregatable." I assume her name is segregatable. Her name is
6 on the document. You can do that, right? Her name is
7 segregatable.

8 MS. BUCHANAN: Your Honor, it has to do with the
9 nature of the document. It's not a question of blocking out a
10 particular line or a digit or a few letters.

11 THE COURT: That's what I don't understand.

12 MS. BUCHANAN: It has to do with the nature of the
13 information, how it relates to the documents.

14 THE COURT: If you did a search based on her name and
15 date of birth, tell me how her name and date of birth on the
16 document is not segregatable to be produced.

17 MS. BUCHANAN: Again, it goes to the nature of the
18 document and why it's put in the database and how it's used
19 once it's in the database. So the fact that -- I mean, we have
20 noted that the document was identified as responsive to the
21 search terms, but going through a document that's in the
22 confidential database and extracting pieces of information is
23 not segregability. It is just not the method here --

24 THE COURT: Well, is my reaction fairly correct that
25 this has very little, if anything, to do with the information

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1 on the document? It has more to do with your consistent
2 position that simply because it's in the file, it shouldn't be
3 produced. You have made no determination that it is in any way
4 responsive to the kind of information that she is asking for
5 other than it was retrieved because you did a search of the
6 name and date of birth.

7 MS. BUCHANAN: It's closer to that, your Honor.

8 THE COURT: That's what I assume. I was going to say
9 much ado about nothing, as they say. You just don't want to
10 set the precedent of giving up a document out of this file. Is
11 that basically it?

12 MS. BUCHANAN: I'm sorry, your Honor?

13 THE COURT: You just don't want to set a precedent of
14 giving up a document out of this file and losing the argument
15 that because it's in the file itself, it is a document blanket
16 protection under the statute to not be produced because it
17 could be used, it's in a visa database?

18 MS. BUCHANAN: The principle of the confidentiality of
19 the records is very important.

20 THE COURT: Is there anything else that's important
21 other than the principle? I'm just trying to figure out.

22 MS. BUCHANAN: Well, your Honor, I mean, it's
23 principle as applied to this case and this FOIA request, and we
24 do respectfully believe it's being properly applied.

25 THE COURT: You're saying you've never produce, the

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1 agency, the state department has never produced a document out
2 of this file pursuant to a FOIA?

3 MS. BUCHANAN: I would say based on my information,
4 absent a court order or some unknown inadvertent release, which
5 is theoretically always possible, but otherwise, no, that this
6 is a consistent and very important principle for the department
7 of state, and we believe it's covered by the statute.

8 THE COURT: Can I see the document?

9 MS. BUCHANAN: Yes.

10 MS. GINSBERG: Your Honor, may I have a moment?

11 THE COURT: Yes.

12 MS. GINSBERG: On the question of the responsiveness
13 of this document to our request, this is the first time that
14 defendants are even making any mention that it may not actually
15 be responsive to their request, and that it's instead
16 responsive to the search that they performed.

17 THE COURT: I sort of got that impression when I read
18 the papers that they didn't particularly -- if your request was
19 a search, as they say, a search for documents, that would help
20 establish how she got into the country.

21 MS. GINSBERG: That wasn't our request. That wasn't
22 the entirety of our request. In paragraph 27 of the Walters'
23 declaration, they say: These records are responsive to
24 plaintiff's FOIA request.

25 In our FOIA request, among other things, we request

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1 everything that they have with the A number, the alien number,
2 that the government assigned to our client.

3 So, to the extent that this document has her alien
4 number or one of the alien numbers that's assigned to her, and
5 it does, it's responsive to the actual request that we made.

6 On this question of -- I was going to move on from the
7 responsiveness.

8 THE COURT: Go ahead.

9 MS. GINSBERG: On the question of exemption 3 being
10 different, it's not different in terms of the analysis, as I
11 think your Honor picked up. There is still a requirement to be
12 an individual assessment of each document, no matter where the
13 document comes from.

14 The document at issue here they have specifically
15 said, in the Walters' declaration, does not pertain to a visa.
16 There is no case that says that if there is a document -- all
17 of the cases about this are documents that pertain to actual
18 visa applications; not hypothetical, possible visa
19 applications, but actual visa applications or refusals. Their
20 position here, the state department's position here, that
21 documents that may be used in the future to adjudicate some
22 hypothetical possible visa, that all of those documents are
23 exempt under FOIA, that position is essentially the same as
24 saying every document that we have that relates to an immigrant
25 is exempt from FOIA. That position is untenable.

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1 Under FOIA, it doesn't meet the individual assessment
2 requirement, and it prevents immigrants from getting
3 information that the state department may have. The state
4 department has turned over documents that pertain to visas as
5 long as they don't pertain to the issuance of a visa, the
6 application and issuance of a visa, or the refusal of a visa.
7 So, there are cases where district court judges look at the
8 statute, and they say, well, this has nothing to do with
9 waivers and this has nothing to do with revocations of visas,
10 so we're going to look at the language of the statute which
11 says the only things exempt are documents pertaining to the
12 issuance or refusal of actual, not hypothetical, but actual
13 visas. And this document does not pertain to any visa. They
14 say there is no visa and that it doesn't pertain to the visa.
15 It's responsive to plaintiff's FOIA request, and, therefore,
16 should be turned over.

17 THE COURT: Give me a little bit of the history as you
18 have it as regard to the client. You have been representing
19 her attempting to do what? Give me what you know about her
20 history, because she was in lockup from when?

21 MS. GINSBERG: So I will give you what I can about the
22 case. Obviously, there are things that are confidential.

23 THE COURT: Whatever you want to give me.

24 MS. GINSBERG: Right. At the filing of this
25 litigation, the immigration judge had terminated proceedings

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1 against our client finding that the government couldn't meet
2 their burden to establish her alienage.

3 THE COURT: When was that?

4 MS. GINSBERG: That was in, I believe, May of 2011.

5 THE COURT: OK.

6 MS. GINSBERG: After that, the government appealed
7 that termination. That appeal was pending at the time that
8 this FOIA litigation was filed.

9 Subsequently, the board of immigration appeals upheld
10 that termination by the immigration judge, saying, yes, the
11 government couldn't meet its burden; this case should be
12 terminated. But that termination is without prejudice to the
13 government, which means that at any point in time, they could
14 reinitiate proceedings against this person. So, she is sort of
15 out there with an unknown status.

16 THE COURT: Are there any proceedings currently?

17 MS. GINSBERG: There are no current proceedings
18 against her, and her mental health and cognitive impairment are
19 in the same place, as far as I know, that they have been
20 throughout the proceedings.

21 But, again, this is really about whether this document
22 can be exempt. They've admitted that it's responsive. Whether
23 it is necessary to any other satellite proceedings, related
24 proceedings isn't the question before the Court. It's simply
25 whether their claim of exemption is proper.

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1 Just quickly on the point of deference, which this is
2 the first I'm hearing of it, I don't see how Chevron deference
3 come into play here. There's no regulation that the state
4 department has implemented. They're simply taking a position
5 in litigation and asking that that be given deference.

6 THE COURT: Ms. Buchanan, the last point Ms. Ginsberg
7 made, I think, is a significant point. Deference doesn't mean
8 that simply because you come into court and say "I don't want
9 to give up this document" that I'm supposed to say "OK."
10 Deference means there is an established interpretation
11 consistent with the interpretation that you want me to give in
12 some rule or regulation that the agency itself has
13 independently taken outside of the position of this lawsuit.

14 The easiest thing for me would be if you showed me
15 some rule, regulation or statute that said because it's in this
16 database, it's exempt. I haven't seen it yet. Do you have any
17 case that ever said that or any rule that was issued by the
18 agency that ever says that or anything related to the statute
19 or history, legislative history, that comes close to saying
20 that other than the position that Ms. Walters is taking as your
21 "expert" in this particular case?

22 MS. BUCHANAN: Well, it has been the consistent
23 litigation position, and that is a relevant factor.

24 THE COURT: So, in what case has that been the
25 consistent litigation position and the court has said, "Yes,

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1 that is the law"?

2 MS. BUCHANAN: Your Honor, all of the cases that we
3 cited -- and I recognize the cases we cited don't have the
4 exact fact pattern that we have here, but what the government
5 has said consistently in how it interprets this statute and its
6 visa database is that if the information is in the database, it
7 pertains to eligibility determinations.

8 THE COURT: Where? I didn't see that in any of your
9 cases.

10 MS. BUCHANAN: It's in the declaration, and the
11 cases -- again, the cases --

12 THE COURT: Well, you say that's been your consistent
13 position in every case, in every litigation, and then you cite
14 some cases for that proposition; but none of those cases are a
15 court affirming that position.

16 MS. BUCHANAN: Respectfully, in those cases, in the
17 cases we cited, the court found, with the exception of *el*
18 *Badrawi* case and *Guerra* case, which we distinguished in our
19 papers, but all the other cases including the circuit cases --

20 THE COURT: Found that because it was in this database
21 that it was exempt?

22 MS. BUCHANAN: Yes. Because it pertains to --

23 THE COURT: Show me. I didn't see that. I didn't
24 even see that the way you argued it. Cite me someplace in any
25 of your cases that says that a court has said that being in

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1 this database itself gives it exempt status.

2 MS. BUCHANAN: I think that's the broad proposition of
3 those cases.

4 THE COURT: That's fine. Quote me that proposition.
5 If that proposition is in the case, I'd like to hear it because
6 I didn't get the impression that that articulated proposition
7 is in any one of those cases, but I haven't looked at all the
8 cases. Even the way you describe it, you don't quote that
9 proposition out of any of those cases.

10 MS. BUCHANAN: Your Honor, I think we did as close as
11 it can be --

12 THE COURT: Tell me how close it comes. Quote to me
13 what you want me to interpret as that proposition.

14 MS. BUCHANAN: I'd have to go back to our papers.

15 THE COURT: I didn't get the impression that there was
16 a case that said that we accept the government's position that
17 simply because it's in this database, and they call it a visa
18 database, that it is automatically exempt from production under
19 FOIA.

20 MS. GINSBERG: Your Honor, I'm looking at the cases
21 cited by the defendant. In each and every one of them, there
22 was an individualized determination that the document sought
23 and the document that the government was claiming were exempt
24 pertain to the issuance or refusal of a visa. There were no
25 cases where they say because it's in the database and might

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1 some day pertain to the issuance or refusal of the visa, it's
2 exempt. There *el Badrawi* case and *Guerra* case are cases that
3 the court said, no, these don't pertain to the issuance or
4 refusal of a visa. I don't care where they came from, they are
5 not exempt because in the *el Badrawi* case it was because the
6 documents there pertain to the revocation of a visa. And in
7 the *Guerra* case, it was because documents pertained to visa
8 waivers.

9 What the government has said in distinguishing those
10 cases is that those cases are looking too closely at the
11 language of the statute. That's how we interpret statutes, we
12 look closely at the language of the statute. The statute says
13 pertaining to the issuance or refusal of a visa. This document
14 doesn't pertain.

15 THE COURT: Ms. Buchanan, would it be your position
16 consistent with what you are arguing that if you had the
17 criminal record of an individual, and you decided to put that
18 criminal record into a file, and that criminal record was put
19 into this file, that would convert that criminal record into a
20 document that is exempt from production because it is in the
21 file, because it probably would make sense if sometime in the
22 future if that individual ever decided to apply for a visa,
23 that obviously someone would want to look and see if they had a
24 criminal record. You're saying simply putting that criminal
25 record in the file would make that exempt?

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1 MS. BUCHANAN: Your Honor, it's always difficult to
2 answer the hypotheticals.

3 THE COURT: Not on the principles you gave me, because
4 on the principle you gave me, that would be the answer. If
5 that's not the answer, then I'm trying to figure out what
6 distinction you're drawing between that and this. You're
7 saying automatically because it's in the file, no matter what
8 kind of document it is, it's exempt. That's your position.

9 MS. BUCHANAN: That's the general position, yes, your
10 Honor.

11 THE COURT: As I say, I'm searching desperately for a
12 case that says that.

13 MS. BUCHANAN: Your Honor, we've cited cases we think
14 support that.

15 THE COURT: Tell me the case. Tell me the case that
16 says that and read me the language that says that.

17 MS. BUCHANAN: I'm citing from our letter brief, your
18 Honor, on page 3 where we list all the cases that have looked
19 at this specific exemption.

20 For example, in the *Judicial Watch* case, we quote, and
21 the language is in there: "Prohibits disclosure of documents
22 retrieved from this visa database."

23 THE COURT: From this visa, and they're talking about
24 this visa database?

25 MS. BUCHANAN: Yes.

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1 THE COURT: Give me the citation.

2 MS. BUCHANAN: *Judicial Watch, Inc. v. U.S. Department*
3 *of State*, 650 F.Supp.2d, 28 at page 33. It's a District of
4 D.C., 2009.

5 THE COURT: That was a determination that it was
6 exempt solely because it was in the database?

7 MS. BUCHANAN: Well, your Honor, I would acknowledge
8 that the cases deal with specific visa applications. The visa
9 application comes from the database.

10 THE COURT: I'm just trying to get the general
11 principle of law that you want me to pull out of that case.
12 Give me that citation one more time.

13 MS. BUCHANAN: It's on page 3 of our letter brief,
14 *Judicial Watch Inc. v. U.S. Department of State*, 650 F.Supp.2d
15 28, 33.

16 MS. GINSBERG: Your Honor, on that same page, what the
17 Court says is -- well, first of all, this was a request for
18 documents pertaining to the refusal of a specific visa. Every
19 document probably responsive to that request is exempt under
20 220(f).

21 What the court said is they weren't just relying on a
22 description of the database there. They required an individual
23 description of each document that the government was claiming
24 was exempt from disclosure. So it wasn't like, oh, it came
25 from the database, end of story. The declaration there

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1 described each document and how it pertained to the refusal of
2 the visa, and all of those documents pertain to a specific
3 individual's visa refusal. That is not the same as what the
4 government is claiming here, that they can withhold a document
5 that some day may be related to the issuance or refusal of the
6 issuance of a visa.

7 MS. BUCHANAN: Your Honor, the focus here is on the
8 terms in the statute "pertaining to."

9 THE COURT: Right.

10 MS. BUCHANAN: And those words should be given broad
11 meaning, and the agency should be given deference in how they
12 construe those words with respect to their database.

13 THE COURT: But every bit of information -- I would
14 assume that, almost without exception, any confrontation or
15 contact with an individual who doesn't have legal status in the
16 United States, that all information that is obtained by the
17 government would be relevant or pertain to the future issuance
18 of a visa, if that person ever applied for a visa.

19 MS. GINSBERG: Your Honor, that's true just of
20 immigrants who don't have lawful status, that's true of many
21 other immigrants who do have lawful status but who apply for
22 some visa later. So, that's a huge swathe of documents
23 pertaining to numerous people in this country who are
24 immigrants here either lawfully or not.

25 THE COURT: Ms. Buchanan, I think this is an important

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1 issue. Quite frankly, I am not particularly interested in just
2 weighing in on this or being the first Judge to simply say one
3 way or the other, you know, all of these things are exempt, no,
4 you know, these things aren't -- they aren't exempt.

5 As I say, my attitude still a little bit "it depends."
6 And I think the intent of the statute even as passed by
7 Congress would be, look, FOIA's purpose is to make sure that --
8 particularly one of its purposes, if you have officials of the
9 government who would want to hide information, that they can't
10 simply hide information based on a blanket assertion that they
11 don't want the public to know this information.

12 So there's got to be some rational basis to guide them
13 and the state department and the courts in terms of what kind
14 of information is produced and what kind of information is not
15 produced.

16 I am hesitant to say that given the purpose of FOIA,
17 that it is simply left to the discretion of the individual
18 bureaucrat as to what file they want to put the documents in
19 that determines whether or not those documents are of public
20 interest or not of public interest.

21 If that were the case, then FOIA would be completely
22 stripped of any power to force the government to disclose
23 things that they should be disclosing simply by your putting
24 everything in a file labeled top secret confidential visas. I
25 can't imagine that that's the intent of the statute, to give

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1 the government the power to do that. You know, it gives the
2 government the power to withhold certain types of information
3 that the government uses for certain purposes.

4 I think the thing that troubles me the most is not
5 your assertion that I should give some deference to the fact
6 that it is in the file, but the additional consideration if you
7 want me to add to this protection by saying, even though it was
8 not put into a file related to any visa application or
9 consideration of any visa application or ever used to consider
10 any visa application, that somehow it has visa application
11 protection because sometime in the future somebody might apply
12 for a visa, and, therefore, that's an automatic exemption from
13 having to produce any of the documents because you put it in
14 that file.

15 That's the part that troubles me the most; that I
16 can't imagine that any court has said just because it might be
17 used, it might be used at some future date if someone ever
18 applies for a visa, and, so, therefore, they put it in a file
19 called visa file, that that necessarily exempts it from any
20 disclosure.

21 If that were the case, any information about any
22 non-citizen could be put in this file. Your argument is, if
23 they weren't want to disclose it, all they have to do is put it
24 in this file. I can't imagine that that's really the intent of
25 the rule or even the state department's intent to have the rule

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1 interpreted that way.

2 MS. GINSBERG: Courts looking at that intent, your
3 Honor, have said that this statute, the purpose of it, is not
4 to reveal the thought processes of those adjudicating visas.
5 So these documents that don't pertain to any actual visa aren't
6 going to reveal anybody's thought processes.

7 THE COURT: In *Judicial Watch*, what page were you
8 quoting from?

9 MS. BUCHANAN: 33.

10 (Pause)

11 THE COURT: I am going to look at it more carefully,
12 but the language with regard to whether the state department
13 properly considered whether portions of the document are not
14 exempt and could be disclosed and the government's obligation
15 to reasonably segregate disclosed all non-exempt material
16 unless the material is inextricably intertwined with exempt
17 portions, I'm not sure that you've gone through that processes
18 because it seems to me the only argument you're making is that
19 none of this pertains to any particular visa application, and
20 that your inquiry stops simply because it's in the file.

21 I am not sure I understand -- and that's why I
22 discussed earlier, I'm not sure I understand what's the basis
23 for your segregatable and non-segregatable argument if none of
24 the document pertains to an application for a visa.

25 MS. BUCHANAN: Your Honor, the position is the

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1 database is used for visa applications in --

2 THE COURT: Even *Judicial Watch* doesn't say that's
3 good enough.

4 MS. BUCHANAN: Your Honor, if you would like, I can
5 consult with my client and have a supplemental submission.

6 THE COURT: Don't you agree -- I assume that's why you
7 put that in the affidavit, you agree that the government has an
8 obligation to reasonably segregate and disclose all non-exempt
9 materials unless material is inextricably intertwined with
10 exempt portions.

11 MS. BUCHANAN: But the point here is in this case, it
12 is inextricably intertwined because it comes from the database
13 that is used for visa --

14 THE COURT: But that was true in this case, and the
15 court still said you had the independent obligation --

16 MS. BUCHANAN: The court concluded it had met it
17 because it came from the visa database documents are exempt
18 from--

19 THE COURT: No, that's not what it says. It said it
20 met it because the state department complied with its
21 obligation, here having found that the documents may not be
22 segregated and released, because the records all pertain in
23 their entirety to visa issuance and refusal. That was the
24 basis of affirming its segregatable portion. It doesn't say
25 simply because it was in the file.

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1 It says they looked at the document and made a
2 determination; that all these documents were generated in
3 relationship to a visa application. That was what the court's
4 analysis was. The court would not even have had to make this
5 statement if, as you say, it's good enough to simply say it's
6 in the file. The court didn't say that. The court said just
7 the opposite. We find that it's in the file, now we have to
8 determine whether it's segregatable.

9 You're arguing the opposite; that once I determine
10 it's in the file, you have no obligation to make any specific
11 assessment of whether it is segregatable. That automatically
12 makes it exempt, whether it's segregatable or not. That's your
13 position. Right?

14 MS. BUCHANAN: Yes.

15 THE COURT: That's not what this case says.

16 MS. BUCHANAN: Well, respectfully, your Honor, we
17 might disagree about how to construe this portion of the
18 decision.

19 THE COURT: Well, you would disagree that the court
20 said you had an independent obligation to reasonably segregate
21 and disclose all the non-exempt material, and that was after it
22 determined that it was in the file?

23 MS. BUCHANAN: That's a general FOIA proposition.

24 THE COURT: Right.

25 MS. BUCHANAN: But when applying it to this specific

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1 exemption and this specific document and the purpose of it
2 being confidential, the segregability analysis doesn't really
3 apply.

4 THE COURT: That's not what this court says. It says
5 it does apply. You're saying you disagree with that
6 proposition. It clearly says that you have to even, though we
7 say it may be exempt because it was a visa application, and
8 it's in a visa file, you still have to look at it and see if
9 it's segregatable. That makes common sense, doesn't it?
10 That's what the Court said. It didn't say what you just said.
11 You don't think that's what the court is saying there?

12 MS. BUCHANAN: Respectfully, no.

13 THE COURT: So why have this discussion at all?

14 MS. BUCHANAN: Because it's walking through the
15 general FOIA elements and when it applied this element, general
16 FOIA element to this specific exemption and this specific
17 statute 220(f) and how it pertains to visas, it concludes that
18 it's satisfied by the fact that it comes from this visa
19 database.

20 THE COURT: Where does it say that?

21 MS. BUCHANAN: The last sentence: "As a result the
22 entire contents of the five visa database documents are exempt
23 from disclosure."

24 THE COURT: That's because the state department
25 complied with its additional obligation to determine whether or

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1 not anything was segregatable from the visa application; and
2 because the court found that they did do that, then all the
3 documents pertaining to the visa application wasn't
4 segregatable.

5 MS. BUCHANAN: They stated it in their declaration in
6 that case, and we've stated it here.

7 MS. GINSBERG: In the declaration in the *Judicial*
8 *Watch* case, they went through each document. And with respect
9 to each, they said it pertained to a particular person's visa.

10 And I think we're getting away from that aspect of
11 this case, which is that there is no visa. In *Judicial Watch*,
12 had there been no visa, had the entire request not been about a
13 visa, they wouldn't have gotten to segregability.

14 But they got to segregability because they found that
15 they pertained to a visa, and then they said, OK, is there any
16 reasonably segregable information? But before they even did
17 that, it was did it pertain to a visa. And it did there. That
18 was the only thing that the plaintiff in *Judicial Watch* was
19 even asking about, was an individual's visa.

20 THE COURT: I want to look at the cases more carefully
21 this weekend because I think the proposition that you are
22 asking me to accept is a little broader than the proposition as
23 I am aware it would read in these cases. I am hesitant --
24 unless I am compelled to do so, I am hesitant to simply say
25 just because you stick it in a file and stamp "visa" on it,

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1 that that automatically ends the government's requirements in
2 terms of assessment of whether or not it is exempt, not exempt,
3 whether or not it is fully exempt or not exempt, even though
4 it's never been used for any visa application or revocation or
5 denial or granting a visa. It's just never been used. I think
6 that that is a broader proposition that may be consistent with
7 all the other cases, and you may convince me of that, but it's
8 clearly broader proposition than any other proposition that
9 I've seen in this case.

10 I'm hesitant to simply say, you know, stamp something
11 top secret, and, therefore, you don't have to produce it.
12 That's basically the whole purpose of FOIA; you can't do that
13 any more. You can't just stamp it visa and say because I
14 stamped it visa, I get to withhold it even though it has
15 nothing to do with assessment of anybody's visa. I am troubled
16 by that concept.

17 So, I will give you a quick opportunity -- let me look
18 at the cases. I'll give you a quick opportunity if you want to
19 get me in the next week, ten days, a further letter with regard
20 to that, that's fine. Then you will have a week, ten days to
21 respond if the plaintiff wants to respond. If you don't,
22 that's fine, because I'm going to move forward anyway.

23 MS. BUCHANAN: Respectfully, your Honor, could we just
24 get a little bit more time? What I would like to do is get a
25 copy of the transcript and have the department of state have an

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1 opportunity to review that.

2 THE COURT: Sure.

3 MS. BUCHANAN: And, thereafter, have supplemental
4 submissions if that would help the, court.

5 THE COURT: Well, this I also what I -- you know what,
6 why don't you give you another day to come in by that date and
7 maybe I can issue a written opinion by that day. Otherwise, I
8 will have everthing you give me and I can deal with the issue
9 when I see you.

10 Why don't I say like the end of September. It will
11 give you both time to if you want to make further argument.
12 But you see where my concerns are. I am not saying that the
13 government isn't entitled to as broad a protection as you're
14 offering, but I think it's pushing the envelope a little bit in
15 terms of the other cases that I've seen. As I said, I hate to
16 characterize it that way, but I am hesitant to have you stamp
17 something top secret and say that that's why it's exempt,
18 simply because it's designated that way or put in a top secret
19 file.

20 So, you know, if you can convince me that simply
21 because it's in the database even though it was never
22 generated, never considered, never utilized, in assessing a
23 visa application, maybe I can accept that, but I won't accept
24 that without some more specific authority that convinces me
25 that that is appropriate quoted reason in law that that is as

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1 broad a proposition that the government can stand behind in
2 terms of them not complying with the FOIA.

3 Why don't you think about it in those terms, both of
4 you. Do you want me to give you this back?

5 MS. BUCHANAN: We can submit it to the Court under
6 seal.

7 THE COURT: All right. It's sealed. But it gives me
8 a nature of the idea and the context. As I say, I think you're
9 right, I think in a practical sense, it is probably much ado
10 about the substance, if not much, given the way you've
11 described it in your papers, but I understand you don't want to
12 open the flood gates and everybody now thinking they can get
13 everything simply out of the visa file.

14 But, frankly, I'm not particularly -- I don't know
15 anything about the case, but I'm not completely convinced that
16 there is anything that you're looking for that's useful to you,
17 but that's not for me to assess. You know best what this case
18 is about and what you want to do with it.

19 So, let me do that. Did I give you a date?

20 MS. GINSBERG: No, your Honor.

21 THE COURT: Let's say September 25; Tuesday,
22 September 25.

23 MS. BUCHANAN: Your Honor, could we do it -- is it
24 possible we could do it in mid October?

25 THE COURT: The 17th?

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1 MS. BUCHANAN: That would be good.

2 THE COURT: October 17. If you are going to submit
3 something, do it in at least the next 30 days so I can read it.
4 But I am going to go forward and review all the cases to give
5 myself an idea of where I think I will be going unless you
6 convince me otherwise.

7 So let's see if we can resolve it by the 17th of
8 October.

9 MS. BUCHANAN: Your Honor, on one other topic of
10 scheduling, there seemed to be some confusion. The parties
11 appeared before your Honor on June 5, and that's when we
12 entered into this scheduling order that we're under now for
13 summary judgment motion, but just prior to that on, June 1, the
14 Court entered the case management plan that the parties had
15 worked out, but it seems like that case management plan has
16 sort of been mooted.

17 THE COURT: I am not even sure what you need to do.
18 Is there anything to do?

19 MS. BUCHANAN: It's moot.

20 THE COURT: This case is over when I make this
21 decision one way or the other, isn't it?

22 MS. BUCHANAN: Right. I'm just making the point that
23 the case management plan that was ordered is moot.

24 THE COURT: I will suspend it unless there's something
25 somebody thinks needs to be done, but this whole case is about

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1 whether you produce this one document or not produce this one
2 document. So let's get it all done and I'll resolve it all by
3 the 17th.

4 MS. GINSBERG: Thank you, your Honor.

5 MS. BUCHANAN: Thank you.

6 (Adjourned)